NO. 48865-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

PEDRO GODINEZ JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-02162-7

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Freddy Landstrom was born in Bogota, Columbia. RP 408. When he was seven years old, his parents were killed. RP 409. At the age of ten, he came to the United States and was adopted. RP 409. Mr. Landstrom was working at a Ford dealership in Milwaukie, Oregon, when he met Joanna Speaks. RP 408, 412. One night after getting off work he went to a convenience store to get some water. RP 412. When he emerged from the store, he saw a woman with two small children and the woman was crying. RP 412-13. The woman was Joanna Speaks. RP 412. He had never met Speaks before. RP 412. No one was helping Speaks, so Landstrom approached her and asked if she was okay. RP 414. Speaks began telling him that she lost her job and was trying to get to her parents' house, but she didn't have bus fare. RP 414. Landstrom thought the situation was very sad and offered her a ride to her destination. RP 414. Landstrom related to Speaks because of his past, when he needed help as a child and his American parents helped him before even knowing him. RP 415. Landstrom offered to hire Speaks to clean his apartment, figuring that he needed the help because he was very busy and she needed the work. RP

417-18. Landstrom had a girlfriend and a daughter but he lived alone. RP 418. Speaks contacted him a few days later about cleaning his apartment. RP 419. She spent several hours cleaning his apartment and he paid her for it. RP 419. Landstrom also offered to pay Speaks to help him move. RP 420. However, Landstrom did not see Speaks again until the date of this incident. RP 420. Speaks told Landstrom during this time she had gotten a job. RP 421.

On November 27, 2012, at around 11:00 p.m., Landstrom had just finished a phone conversation with his girlfriend and was preparing to go to bed. RP 422. He couldn't sleep, however, and decided to go to La Center to play poker, as he occasionally did. RP 410, 422-23. He never made it to La Center. RP 423. He received a call from Speaks, and she was crying. RP 424. She told him she'd lost her job and that her electricity was going to be shut off the next morning. RP 424. He told her to calm down and that he would pay the bill. RP 424-25. He planned to drop off the money at her apartment and continue on to La Center. RP 425. She asked him to stop and get her some beer on the way. RP 425-26. He stopped at a gas station on Mill Plain Boulevard in Vancouver and purchased some Corona beer. RP 426-27, 432. He drove his new black Nissan Sentra that night. RP 432.

When Speaks let Landstrom into the apartment it was dark, and she said "follow me." RP 434. He could see by the light on in her bedroom, and as he followed her further in to the apartment she told him where to put the beer. RP 435. She gave him a stoic look and he asked her if she was okay. RP 435. At that point he heard the door to the apartment open and shut, and a man came in with a gun. RP 435-36. The man was the defendant, Pedro Godinez. RP 436. Landstrom assumed at that point that he and Speaks were about to be robbed. RP 437. Godinez said something in Spanish, and Speaks went over to Godinez and whispered in his ear. RP 437. At that point Landstrom realized he'd been set up by Speaks. RP 437. Speaks went to the back of the apartment and Godinez told Landstrom to take off his jacket and take everything out of his pockets. RP 438. Landstrom took out his wallet, keys and phone. RP 438.

Godinez began giving Landstrom instructions. RP 441. He led Landstrom down to the Nissan at gunpoint, threatening that he would shoot Landstrom if he didn't comply. RP 441. At the car, Landstrom got into the driver's seat and Godinez got into the middle of the backseat with the gun pointed at Landstrom. RP 443. Godinez forced Landstrom to drive for a long time, and it felt like hours to Landstrom. RP 445. Eventually Godinez directed Landstrom to a "paved wilderness place." RP 447. Godinez asked Landstrom who were the most important people in his life.

RP 447. Before he could answer, Godinez said "It isn't your daughter, I know that." RP 447. Up to that point, Landstrom had not mentioned having a daughter. Landstrom said it was his brother and his daughter. RP 447. Godinez said "don't do anything stupid because I know everything about you." RP 447. Godinez then revealed that Speaks had told him (Godinez) everything about Landstrom. RP 448. Godinez told Landstrom "I've done this before," and threatened that he would get to Landstrom's family. RP 450. Landstrom hoped that he could talk Godinez out of killing him. RP 450-51.

Eventually Godinez told Landstrom to stop the car on a gravel road. RP 451-52. He told Landstrom to get out of the car and hand him the keys. RP 452. At that point, Landstrom thought he was going to die. RP 453. Godinez instructed Landstrom to walk down the gravel road, and told him not to turn around, and "just keep walking." RP 456. Godinez told him to stop, and told him to get on his knees. RP 457. Landstrom began pleading for his life, reminding Godinez that he already had Landstrom's car and credit cards, telling him he didn't have to do this. RP 457. Godinez began asking Landstrom how much money was available on each of his credit cards, and told Landstrom not to "cry like a bitch." RP 457. They began walking again, and Landstrom thought Godinez was considering not killing him. RP 458. But they eventually stopped again and Godinez told

Landstrom to take his shoes off. RP 459. He also told Landstrom he could report his car stolen the following Saturday, and asked Landstrom for his PIN numbers, which Landstrom gave him. RP 459. They began walking again and Landstrom begged Godinez to allow him to run away. RP 460. Godinez told Landstrom to get on his knees. RP 460. Godinez then said "Sorry, I lied. This is your last night." RP 461. Godinez then made the sign of the cross and began shooting Landstrom. RP 461.

The first shot hit Landstrom in the head, but it turned out to be a grazing wound. RP 461. Godinez exclaimed "What? You're not dead?" RP 461. Godinez shot him again in the chest area, and said "die." RP 462. Landstrom put his hand up to defend himself and a bullet shattered his hand. RP 462. Godinez shot Landstrom again, saying "Why won't you die?" RP 462. Despite extreme pain and continued shots, Landstrom got up and ran away. RP 462-63. Landstrom ran to a nearby swamp, with Godinez yelling "You're dead!" RP 463. As Landstrom fled he tried to cover himself in mud and stayed low in the swamp. RP 464. Landstrom stayed in the swamp for a period of time, thinking Godinez was still after him. RP 466. He eventually got up and searched for help. Id. He was cold and tired. RP 466-67. He eventually made it to Kadow's Marina, where Sharon Baisden, a resident at the marina, called 911. RP 165. Officer Janisch and Sgt. Alie of the Vancouver Police Department were the first

officers to arrive at the scene. RP 113. They were dispatched at 4:30 a.m. RP 112. Sgt. Alie observed that Landstrom was afraid that the shooter was going to go after his family, and feared he would die. RP 114, 116.

Godinez was convicted of attempted murder in the first degree, kidnapping in the first degree, and robbery in the first degree. CP 123-135. In his first direct appeal, this Court found that the offender score was too high by one point, because a point had been improperly added for community custody. Thus, Godinez's offender score should have been seven as to count 1, and six as to count 5. On remand, the offender score was corrected seven on count 1and six on count 5. CP 163. The trial court again imposed an exceptional sentence. The sentence imposed was 600 months, down from the original 607 month sentence. CP 136,164. This timely appeal followed.

ARGUMENT

I. The trial court properly imposed an exceptional sentence and this Court should decline to review this issue.

Godinez may not raise a new issue in this, his second appeal, which he could have raised in his first appeal but elected not to. Generally, a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal. *State v. Mandanas*, 163 Wn.App. 712, 716, 262 P.3d 522 (2011) (citing *State v. Sauve*, 100 Wn.2d

84, 87, 666 P.2d 894 (1983) and *State v. Jacobsen*, 78 Wn.2d 491, 493, 477 P.2d 1 (1970)).

In *State v. Mandanas*, 163 Wn.App. 712, 262 P.3d 522 (2011), this Court stated that "[t]he general rule is that a defendant is prohibited from raising issues on a second appeal that were or could have been raised on the first appeal." *Mandanas*, 163 Wn.App. at 716. This rule applies even to constitutional issues. "'Even though an appeal raises issues of constitutional import, at some point the appellate process must stop. Where, as in this case, the issues could have been raised on the first appeal, we hold they may not be raised on a second appeal.'" *Id.* at 717 (quoting *State v. Sauve,* 100 Wn.2d 84, 87, 666 P.2d 894 (1983)).

> Further, in *State v. Barbiero,* 121 Wn.2d 48, 846 P.2d 519 (1993), in a nearly identical case to the one at bar, our State Supreme Court held that a resentencing due to a corrected offender score involving an exceptional sentence was not appealable. There, the defendant had been convicted of Rape in the Second Degree and Rape in the Third Degree, and the trial court imposed an exceptional sentence on each count. *Barbiero*, 121 Wn.2d at 49. On appeal, the Court of Appeals reversed the Rape in the Third Degree conviction, but affirmed the Rape in the Second Degree conviction and sentence. *Id.* At resentencing to correct the offender score due to the vacation of the Rape in the Third Degree conviction, the defendant attempted to challenge the aggravating factor found by the court at the first sentencing, and also argued his exceptional sentence should be proportionately reduced as the standard sentence range changed due to the elimination of the other current offense point in his offender score. *Id.* At resentencing, the trial court imposed the same exceptional sentence, despite the

> reduction in standard range and elimination of one aggravating factor. *Id.* at 51. The trial court there made it clear that it was not reconsidering its prior exceptional sentence, which had been affirmed by the Court of Appeals. *Id.* In deciding this case, the Supreme Court stated, [t]his case well illustrates the necessity of the rule which denies review at this late stage. The issue presented as a *clear and obvious* issue which could have been decided in 1990 in the first appeal. Instead of a timely and orderly proceeding to determine the matter on the merits, the State, the Court of Appeals, a department of this Court, and allied staff, have had to deal with a procedural morass, all of which could have been avoided had the matter been raised when it should have been in the first appeal. In the interest of judicial economy, already too much wasted, we hereby affirm the Court of Appeals without further proceedings.

Id. at 52 (emphasis added).

As in *Barbiero, supra,* Godinez did not previously challenge the exceptional sentence in any way, either by challenging the basis for the exceptional sentence, its length, or the court's findings and conclusions. On remand for resentencing, the trial court based its imposition of an exceptional sentence on the same jury findings that remained untouched after the first appeal. Godinez chose not to litigate this issue on his first appeal. This issue is identical to what it would have been had Godinez raised it initially. As the Court noted in *Barbiero*, Godinez's issue was a "clear and obvious issue which could have been decided in [the earlier appeal]." *Barbiero*, 121 Wn.2d at 52. Godinez should have raised this

issue in his first appeal; he chose not to. Godinez may not now raise this new issue. This Court should decline to review this issue.

Even if it were proper to raise this claim in a second appeal, Godinez's argument nevertheless fails. First, he relies on *State v. Friedlund*, 182 Wn.2d 388, 341 P.3d 280 (2015) to support his claim that the trial court's written findings and conclusions were inadequate to permit appellate review. But *Friedlund* involved cases in which the trial court *entirely failed* to enter written findings and conclusions. *Friedlund* at 394. Here, the trial court entered written findings and conclusions. The written findings and conclusions are sufficient to permit appellate review. But Godinez's argument does highlight the post-*Blakely*[1] oddity of requiring the trial court to make "findings of fact" as it relates to exceptional sentences based on aggravators which can only be found by the jury.

Under both pre and post-*Blakely* case law, the statute governing appellate review of the propriety of an exceptional sentence is as follows:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

[1] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004).

RCW 9.94A.585(4); former RCW 9.94A.210(4).

Case law has described the review process as a three part inquiry:

> In reviewing an exceptional sentence, an appellate court undergoes a three-part analysis. First, the court asks whether the factors listed by the court for an exceptional sentence are supported by the underlying record. The court applies a "clearly erroneous" standard to this review. Second, the court must determine whether the factors used by the trial court are valid as a matter of law. Finally, the court must determine, under an "abuse of discretion" standard, whether the sentence is clearly too lenient or clearly too excessive. *State v. Solberg,* 122 Wn.2d 688, 705, 861 P.2d 460 (1993); *State v. Batista,* 116 Wn.2d 777, 792, 808 P.2d 1141 (1991).

State v. Cardenas, 129 Wn.2d 1, 5–6, 914 P.2d 57 (1996).

The "factors" in support of an exceptional sentence are the aggravators, which are now contained in an exclusive list of aggravators found in RCW 9.94A.535. Prior to *Blakely*, the trial court made the factual findings in support of an aggravator that provided the legal basis for an exceptional sentence. It made sense, then, that the trial court would enter written "findings of fact." But post-*Blakely*, the trial court is prohibited from making factual findings in support of aggravating circumstances in almost every situation.[2] It is strange, then, that the statutory scheme still asks the trial court to make factual findings that continue to be reviewed under the clearly erroneous standard. Indeed, in a separate appeal the State

[2] RCW 9.94A.535 lists four circumstances in which aggravating circumstances may be considered by the trial court.

is litigating in *State v. Weller*, COA No. 48056-5, the same trial judge that sentenced Mr. Godinez is accused of engaging in prohibited judicial fact finding where she made extensive written findings of fact in support of her conclusion of substantial and compelling reasons justifying an exceptional sentence, rather than merely cite exclusively to the jury's finding of a statutory aggravator, as the appellant argued the trial court was limited to doing. So one is left to wonder what a trial judge is expected to do when the statute and relevant case law expects the judge to enter written findings of fact, but a judge is not permitted to make factual findings in support of an aggravator.

There have been inconsistencies in appellate cases since the *Blakely* decision and the Legislature's failure to revisit the "findings of fact and conclusions of law" requirement imposed on the trial judge. In *State v. Hale,* 146 Wn.App. 299, 189 P.3d 829 (2008), this Court observed:

> Prior to *Blakely,* our Supreme Court established a three-part analysis to review the trial court's findings and conclusions, justifying an exceptional sentence under RCW 9.94A.585. *State v. Fowler,* 145 Wn.2d 400, 405, 38 P.3d 335 (2002).
>
> ...
>
> After *Blakely,* the trial court retains its discretion to determine whether the jury's findings "are substantial and compelling reasons justifying an exceptional sentence," former RCW 9.94.537(5), but the jury now determines the

> factual basis for the aggravating circumstances and the trial court is "left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence." *State v. Suleiman,* 158 Wn.2d 280, 143 P.3d 795 (2006) at 290–91. Although the Legislature has amended our statutes to conform to *Blakely,* RCW 9.94A.535 still requires a trial court to enter written findings of fact and conclusions of law to justify its imposition of *any* sentence outside the standard range. The statutory language is clear and the trial court must enter findings and conclusions justifying its exceptional sentence, as it did here.[4] *See State v. Chapman,* 140 Wn.2d 436, 450, 998 P.2d 282 (2000) ("If the language of a statute is clear on its face, courts must give effect to its plain meaning and should assume the Legislature means exactly what it says.... A statute that is clear on its face is not subject to judicial interpretation.").
>
> After *Blakely,* no case has fully addressed an analysis under RCW 9.94A.535 when the jury finds the aggravating circumstances and the trial court imposes an exceptional sentence above the standard range. We hold that we will review those findings and conclusions under a modified three-pronged analysis. Under the first prong, instead of determining whether the record supports the reasons the sentencing court gave for imposing an exceptional sentence, we must review whether the record supports the jury's special verdict on the aggravating circumstances. *See* RCW 9.94A.585(4); *Fowler,* 145 Wn.2d at 405, 38 P.3d 335.

State v. Hale, 146 Wash. App. at 306-307.

The *Hale* Court went on to state that the second step and third steps of the inquiry would remain the same: the trial court's discretionary decision whether to impose an exceptional sentence would be reviewed for whether it was justified as a matter of law, and the length of the sentence

(whether clearly excessive or clearly too lenient) would be reviewed for abuse of discretion. *Hale* at 308-309. Since *Hale*, appellate courts have departed from the "clearly erroneous" standard and declared that the standard for reviewing the jury's verdict as to an aggravating factor is reviewed using the sufficiency of the evidence standard for criminal convictions. *State v. Chantabouly*, 164 Wn.App. 104, 142, 262 P.3d 144 (2011) ("We review a jury's special verdict finding the existence of an aggravating circumstance under the sufficiency of the evidence standard"); *State v. Hyder*, 159 Wn.App. 234, 259, 244 P.3d 454 (2011).

Here, Godinez claims that the trial court erred as a matter of law in imposing an exceptional sentence because the court's conclusion of law that an exceptional sentence was warranted is inadequate because the conclusion was based exclusively on the jury's verdicts on the aggravators, and because there were not substantial and compelling reasons justifying an exceptional sentence. In his argument, Godinez misunderstands the nature of appellate review of this factor.

Appellate review of an exceptional sentence is governed exclusively by RCW 9.94A.585(4), and provides that an appellate court may not reverse an exceptional sentence unless it finds either that the reasons supplied by the sentencing court are not supported by the record which was before the trial judge or the reasons do not justify a sentence

outside the standard range for that offense, or that the sentence imposed is clearly excessive or clearly too lenient. Godinez posits that the de novo review of whether the reasons relied upon by the court justify a sentence outside the standard range (in this case, the statutory aggravators found by the jury and unchallenged by Godinez) involves some sort of proportionality analysis, wherein this Court should simply look at the facts and conclude that this crime was no more egregious than any other attempted murder and kidnapping. But we know the record contains sufficient facts to support the conclusion that Godinez acted with deliberate cruelty and an egregious lack of remorse because those factual determinations were made by the jury, and Godinez does not challenge the sufficiency of the evidence to support those verdicts. To the extent that Godinez envisions that the trial court engages in its own *fact finding* mission wherein the court evaluates the facts anew and decides for itself whether the facts adduced at trial really do manifest deliberate cruelty and an egregious lack of remorse, he is mistaken.

The role of the trial court is to determine whether the aggravators found by the jury provide a substantial and compelling reason to impose an exceptional sentence. Contrary to Godinez's assertion, the trial court can find substantial and compelling reason based solely on the jury's finding of an aggravator. In both *Hale* and *Hyder*, supra, the trial court

relied solely on the special verdicts to find substantial and compelling reason to impose an exceptional sentence and this Court affirmed in both instances. *Hale* at 308, *Hyder* at 263. It is true that the conclusions of law in those cases were phrased in the boilerplate of "substantial and compelling reasons," but the trial court in each of those cases nevertheless relied exclusively on the jury's verdict on the aggravators. Likewise, in the unpublished *State v. Betts*, 175 Wn.App. 1062, 2013 WL3963528 (July 30, 2013), the trial court expressly relied on the jury's special verdict on the aggravators to find substantial and compelling reason to impose an exceptional sentence and this Court approved that approach. *Betts* at page 18. (The sentence in *Betts* was reversed, but not because the trial court *failed* to engage in independent fact finding, beyond the jury's verdicts, that would support a conclusion of substantial and compelling reason to impose an exceptional sentence. Rather, it was reversed because the trial court did, in fact, engage in additional fact finding, beyond the aggravators found by the jury, and remarked that an exceptional sentence was justified as a matter of law because of the defendant's lack of remorse. *Id.*) Godinez's argument that the trial court's conclusion of law is lacking because it relies on the special verdicts returned by the jury, without additional fact finding by the trial court about how Godinez's case compares, factually, to other attempted murder cases, fails. Likewise,

Godinez's factual argument, predicated on a recitation of facts adduced at trial, that this attempted murder and kidnapping case was "run of the mill" and "no different" from other attempted murder and kidnapping cases, is an evidence insufficiency argument inexplicably packaged as an argument about lack of legal justification for an exceptional sentence. Again, the review of substantial and compelling reasons justifying a departure from the standard range does not involve a proportionality review of the universe of other cases within the same class. In *State v. Solberg*, 122 Wn.2d 688, 703, 861 P.2d 460 (1993), the Supreme Court rebuked the Court of Appeals for engaging in "proportionality" analysis in its review of whether the facts of that case were more egregious than other cases involving the same crime. The Court said

> This is not the proper inquiry...Comparing the facts of the current drug crime with prior crimes described in published appellate decisions would likely result in comparing the crime to the most egregious examples of violations of the statute because most minor cases are resolved by plea bargaining, at the trial court level, or in unpublished appellate decisions.

Solberg at 703.

Even if proportionality review were the correct inquiry, the facts of this case support the trial court's conclusion that an exceptional sentence was justified as a matter of law. This was not a "run of the mill"

kidnapping and attempted murder. The facts of this case are horrific. The sentence of the trial court should be affirmed.

Godinez's final claim is that the sentence imposed is clearly excessive. This claim is meritless.

Under RCW 9.94A.585(4)(b), the appellate court may reverse an exceptional sentence if it is clearly excessive. This Court reviews whether an exceptional sentence is clearly excessive under the abuse of discretion standard. *State v. Oxborrow*, 106 Wn.2d 525, 530, 729 P.2d 1123 (1986); *State v. Knutz,* 161 Wn.App. 395, 410, 253 P.3d 437 (2011). When an exceptional sentence is based on proper reasons, it will be found clearly excessive only if, in light of the record, the length shocks the conscience. *State v. Ross*, 71 Wn.App. 556, 571-72, 861 P.2d 473 (1993). A sentence shocks the conscience if it is one that "no reasonable person would adopt." *Knutz* at 411 (quoting *State v. Halsey,* 140 Wn.App. 313, 324–25, 165 P.3d 409 (2007)). "...[T]he trial court has all but unbridled discretion in setting the length of the sentence." *State v. Creekmore,* 55 Wn.App. 852, 864, 783 P.2d 1068 (1989)).

Godinez does not actually argue his sentence is clearly excessive. Rather, he complains that the trial court imposed the "same sentence" it imposed in the first sentencing, and posits that upon resentencing, the trial court was somehow obligated to impose a shorter sentence (of what

length, he does not say). He complains the trial court "flouted" the decision of this Court. This argument is absurd. First, the trial court did not impose the "same sentence." The first sentence was 607.75 months, and the second sentence is 600 months. Second, this Court, in its original opinion, ordered a one point reduction in the offender score—and nothing more. This Court said nothing about the length of Godinez's exceptional sentence (which, again, he chose not to challenge).

Godinez cites no authority for the proposition that upon reduction of an offender score, the trial court must revisit and reduce the length of a properly imposed, unchallenged exceptional sentence. Indeed, in *Barbiero*, supra, the defendant received an identical exceptional sentence after resentencing on a corrected (downward) offender score resulting from the reversal of one of his convictions on direct appeal. *Barbiero* at 49-50.

As Godinez cites no authority for his novel claim that a trial court lacks the discretion to impose "essentially the same [exceptional] sentence" after remand to correct an offender score, this Court should not consider this argument at all. "We need not consider arguments that are not developed in the briefs and for which a party has not cited authority." *State v. Harris*, 164 Wn.App. 377, 389 n.7, 263 P.3d 1276 (2011).

This Court should affirm Godinez's sentence.

CONCLUSION

Godinez's sentence should be affirmed.

DATED this 20th day of January, 2017.

Respectfully submitted:

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